

In the Matter of Francisco Ortiz,
DOP Docket No. 2005-1293
(Merit System Board, decided March 22, 2006)

The appeal of Francisco Ortiz, a Police Officer with the City of Newark, concerning his 12-day suspension on charges, was heard by Administrative Law Judge Leslie Z. Celentano (ALJ), who rendered her initial decision on February 8, 2006. Exceptions were filed on behalf of the appellant, and cross-exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on March 22, 2006, accepted and adopted the Findings of Fact as contained in the attached ALJ's initial decision, but did not adopt the recommendation to modify the 12-day suspension to a 30-day suspension. Rather, the Board imposed a 45-day suspension.

DISCUSSION

The appellant was charged with violating the Newark Police Department's Rules and Regulations regarding obedience to orders, care of property and neglect of duty. Specifically, the appointing authority asserted that, on May 10, 2004, the appellant was involved in a scuffle in New York City, during which he lost his service weapon. Upon learning of the incident, the appellant's superior issued two orders directing him to report to the Internal Affairs Bureau, and the appointing authority asserted that the appellant unreasonably delayed complying with the orders. Following a departmental hearing, the appellant was suspended for 12 days. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In her initial decision, the ALJ set forth that there was no dispute that the appellant was in New York City on May 10, 2004, and he lost his service weapon during an altercation. The ALJ noted that any Police Officer carrying his or her weapon into the State of New York was required to report to the New York Police Department, which the appellant failed to do. Upon being notified of the appellant's involvement in an altercation and the loss of his firearm, Thomas Grabosky, a Police Sergeant, ordered the appellant at approximately 8:00 a.m. to report to the Internal Affairs Bureau as soon as he completed his report with the New York Police Department. When the appellant did not report for several hours, Grabosky repeated the order at approximately 1:30 p.m. The ALJ found that the appellant did not report to the Internal Affairs Bureau until after 5:00 p.m. on May 10, 2004 because, upon his return from New York City, the appellant met with his attorney and sought medical attention. The ALJ recommended upholding the charges

against the appellant. Specifically, the ALJ found that the appellant disobeyed two lawful orders to report to the Internal Affairs Bureau immediately, “choosing instead to report at his convenience.” In addition, the ALJ concluded that the appellant violated departmental rules governing the care of property and neglect of duty, when he failed to safeguard his service weapon and lost it in the scuffle. Based on the gravity of the appellant’s offense and the nature of his position, the ALJ concluded that a 12-day suspension was an insufficient penalty; thus, the ALJ recommended increasing the penalty to a 30-day suspension.

In his exceptions to the ALJ’s initial decision, the appellant maintains that the delay in responding to the Internal Affairs Bureau as ordered was occasioned by his need to seek legal advice and medical attention following the incident in New York City. He contends that the delay was, thus, reasonable. The Board is not persuaded by the appellant’s exceptions.

While the Board agrees with the ALJ’s determination of the charges, the Board disagrees with the ALJ’s recommendation that a 30-day suspension is the proper penalty. Rather, the Board finds that a 45-day suspension is the appropriate penalty. Initially, *N.J.S.A.* 11A:2-19 and *N.J.A.C.* 4A:2-2.9(d) specifically grant the Board authority to increase or decrease the penalty imposed by the appointing authority. The only limitation on this authority is that “removal shall not be substituted for a lesser penalty.” Increases in disciplinary penalties have been upheld in prior cases, where the circumstances warranted such an increase. See *Sabia v. City of Elizabeth*, 132 *N.J. Super.* 6 (App. Div. 1974); *Dunn and Shogoke v. Merit System Board*, Docket No. A-4645-96T1 (App. Div. March 20, 1998); *In the Matter of Craig Davis, South Woods State Prison, Department of Corrections*, Docket No. A-4345-02T3 (App. Div. August 2, 2004) (Board affirmed increase from a 15-day suspension to a six-month suspension for a Senior Correction Officer found guilty of inappropriate touching of an inmate during a strip search); *In the Matter of Frederick Dusche* (MSB, decided April 23, 2003) (Police Officer found guilty of falsely arresting civilian had 30-day suspension increased to six-month suspension).

In determining the proper penalty, the Board’s review is *de novo*. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant’s offense, the concept of progressive discipline, and the employee’s prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R.* 2d 463, 465 (CSV) 1996. Although the Board applies the concept of progressive discipline in determining the level and propriety of penalties, an individual’s prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway*, 81 *N.J.* 571, 580 (1980). Even when a law enforcement officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense may nevertheless warrant the penalty of removal where it is likely to undermine the public trust. In this regard, the Board emphasizes that a law

enforcement officer is held to a higher standard than a civilian public employee. *See Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966). *See also In re Phillips*, 117 N.J. 567 (1990). In the instant matter, the egregiousness of the appellant's offense must be emphasized. It must also be underscored that, at the time of the incident, the appellant was a relatively short-term employee, having been employed for less than three years. The appellant, a law enforcement officer, involved himself in an altercation in New York City, while in possession of his service weapon while off duty. The transportation of his firearm into the State of New York without reporting it was itself a violation of New York State law. During the incident, the appellant carelessly failed to keep his firearm secure, resulting in its loss. This incident clearly could have had grave consequences. In addition, when directed by his superior officer on two occasions to immediately report to the Internal Affairs Bureau in relation to his involvement in the fracas and the loss of his handgun, the appellant failed to do so in a timely manner. The appellant's conduct warrants a significant penalty, regardless of his lack of any major disciplinary history. Accordingly, based on the totality of the record, including the seriousness of the offense, the Board concludes that a 45-day suspension is the appropriate penalty.

ORDER

The Merit System Board finds that the action of the appointing authority in imposing disciplinary action was justified. However, the Board modifies that action to increase the 12-day suspension to a 45-day suspension. Therefore, the Board dismisses the appeal of Francisco Ortiz.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.